



Comptroller General
of the United States

Washington, D.C. 20548

149677

Decision

Matter of: Attorney's Fees Settlement of Grievance
Whistleblower Protection Act

File: B-249696

Date: July 19, 1993

DIGEST

The attorney's fees provision of the Whistleblower Protection Act (WPA) may not be used to authorize payment of the attorney's fees of an employee who alleged a violation of that Act as part of the settlement reached through the agency's informal grievance procedures. That provision applies only to actions appealed to or from the Merit Systems Protection Board.

DECISION

The Nuclear Regulatory Commission (NRC) requests our decision whether the agency may include an employee's attorney's fees as part of a settlement of the employee's grievance, in which he alleged that the agency transferred him in violation of the Whistleblower Protection Act (WPA), Pub. L. 101-12, 103 Stat. 16, April 10, 1989. For the reasons stated below, the answer is no.

BACKGROUND

The NRC detailed a Senior Executive Service (SES) employee to another SES position in the same office without a reduction in pay or SES level. The employee filed a formal grievance under the agency's internal grievance procedures (which are discussed below) alleging that the detail violated the WPA, which prohibits agencies from taking personnel actions (including details) against employees in retaliation for the disclosure of government illegality, waste and corruption. 5 U.S.C. § 2302(b)(8) (1988), as amended.

OPINION

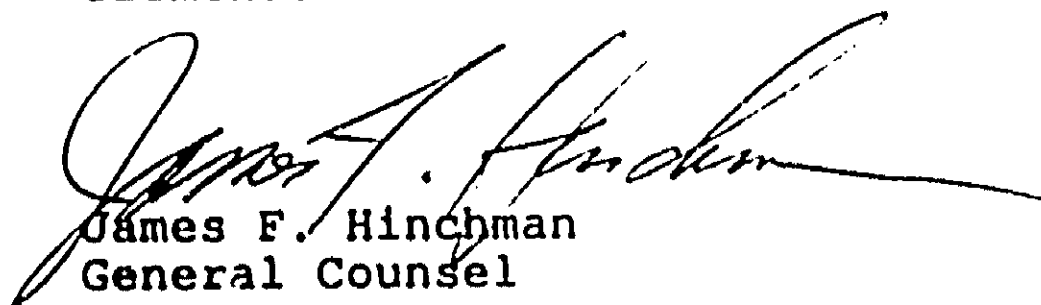
Initially, we note the well-settled rule that an agency may not pay attorney's fees absent specific statutory authority. Norman E. Guidaboni, 57 Comp. Gen. 444 (1978). Because of the nature of this case, we may eliminate two such authorities from consideration. The Back Pay Act, 5 U.S.C. § 5596 (1988), is not available because the employee did not suffer a reduction or loss of pay, and, the Equal Access to Justice

Act, 5 U.S.C. § 504 (1988) does not authorize attorney's fees in settlements made through informal agency grievance procedures. Stanley D. Welli, 68 Comp. Gen. 366 (1989).

Under the WPA, the employee could have sought corrective action from the Office of the Special Counsel, 5 U.S.C. § 1214(a)(3). If the Special Counsel failed to act or chose not to act within the specified time limits, the employee then could have appealed directly to the Merit Systems Protection Board, 5 U.S.C. § 1221(a) (1992) and, if successful, been awarded attorney's fees, 5 U.S.C. § 1221(g)(1). He also could have appealed the MSPB's decision and have been awarded attorney's fees, 5 U.S.C. § 1221(g)(2).

In this case, however, the employee attempted to resolve the matter through the NRC's grievance procedures. By their own terms, these procedures do not apply to "any matter which an employee is entitled to appeal to the Merit Systems Protection Board." Para. A2(j), NRC Manual Appendix 4157, Sept. 18, 1984. Therefore, though they provide an appropriate forum to grieve a transfer generally, they do not appear to provide for grieving a transfer allegedly in retaliation for whistleblowing within the coverage provided by the WPA. Furthermore, although the NRC's grievance procedures may be faster, less expensive and more informal than the procedures in the WPA, they do not provide for attorney's fees--nor could they, as we noted above, absent specific statutory authority.

In effect, the proposed settlement would apply the WPA's remedies to the NRC's internal grievance procedures. However, the attorney's fees provision in the WPA applies only to MSPB actions. Yet, this case has not reached the Board or even crossed the first hurdle on its way there, because the employee has not submitted an allegation to the Special Counsel. Accordingly, we do not believe the WPA may be used as a basis to include attorney's fees in the proposed settlement.


James F. Hinchman
General Counsel